FOREIGN INVESTMENT

Land Ownership, Use and Property Rights: the Balance Between Local Ownership and Foreign Investor Security

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Land tenure in developing countries

The rational basis for restricting rights in land to native peoples is easy to discern. The literature — historic, legal, political, geographic — is filled with tales of dispossession by invaders, whether armed or economic. For example, of the 66 million acres 'won' by the Maori under the Treaty of Waitangi, only 5 million remained by 1917, most of which was lost by alienation [W Galvin, 'Maori Land Development', *Auckland Univ L Rev* 291 (19??) at 291]. Much the same happened to lands owned by native Hawaiians in Hawaii [Cooper and Daws, *Land and Power in Hawaii* (1985); Callies, *Regulating Paradise: Land Use Control in Hawaii* (1984) at Ch 1]. While there are many theories concerning why this is so, perhaps the most common, aside from the alleged greed and sharp dealing of foreigners, is that the concept of exclusive possession of land was inconceivable to most aboriginal natives and so the parting with rights to land had very little meaning and was accordingly done more or less freely.

However, it is equally clear that when a legally-enlightened indigenous people are able to gain control of sufficient government machinery, among the first laws passed are those which severely restrict or forbid foreign ownership of land. Thus, article 27 of the Mexican Constitution states:

> '[O]nly Mexicans by birth or naturalisation and Mexican corporations have the right to acquire ownership of lands, waters and their appurtenances or to obtain concession ... for the utilisation of waters. The Nation may grant the same right to aliens (under certain conditions). Under no circumstances may foreigners acquire direct ownership of lands and waters within a zone of 100 kilometres wide along the frontiers or of 50 kilometres wide along the seacoast.'

Similarly, Article 13 of the Philippine Constitution states: 'Section 5. Save in areas of hereditary succession, no private agricultural land shall be transferred or assigned except to individuals, corporations or associations *qualified* to acquire or hold lands of the public domain in the Philippines.' (emphasis added)

By a previous section of the same article, the 'qualification' is citizens of the Philippines or a corporation which is 60 per cent Philippine-owned. Largely the same is true of lands in many Pacific island states. In Fiji, for example, foreigners can acquire that small (around 10 per cent) percentage of land which is not held by a native trust for native Fijians only with great difficulty. As to the land held by a trust entity created to deal with non-Fijians wishing to use native lands (nearly 90 per cent of the land in Fiji) foreign ownership is impossible [See, Callies & Johnson, *A Survey of Land ... Six Pacific Basin Countries* (1985)]. The Republic of the Marshall Islands (RMI) has similar restrictions on all land [Callies & Johnson, *Legal, Business and Economic Aspects of Cobalt-Rich Manganese Crust Mining and Processing in the Republic of the Marshall Islands* (1989)]. In the Commonwealth of the Northern Mariana Islands (CNMI), foreigners are prohibited from owning a long-term interest in real property. In March of 1993, Transamerica Corp was evicted from the property it had occupied, as a tenant with a 55-year lease in part, on the ground that such a lease was a 'long-term' interest in property illegally held by a foreign corporation (*Marianas Variety*, 1 April 1993, p 1). In both Fiji and RMI, land is held communally, with many people having various interests which collectively may amount to the fee simple favoured by western nations for land ownership and tenure.

The problem restated

While therefore the rationale for and actuality of foreign ownership restrictions is by and large unimpeachable, there is a clash between such restrictions and such statements as the following contained in a 1969 brochure on doing business in the Philippines: 'It is the policy of the government to *encourage* foreign investments in projects to develop agricultural, mining and manufacturing industries. The government especially *welcomes* and *encourages* foreign capital to establish pioneer enterprises that are capital intensive and would utilise a substantial amount of domestic raw materials. ...' (emphasis added).

Similar language can be found in the promotional literature of most emerging nations, particularly in the South Pacific. If there is no means available to transfer at least some interest, if not in fee simple then in some lesser interest in property, then it is difficult to see how it is that foreign investment of any size will be attracted. This is a twofold problem. Not only is there a need to find some mechanism to transfer some kind of property interest, but the interest must be secure for a period long enough for the foreign investor to make a profit and protect or

recoup the original investment. It is no answer to an investor (or potential investor) to be told that if a problem arises, the local patriarch, chieftain, or elder (or council thereof) will solve it. If emerging Pacific island states are serious about attracting foreign investment involving land use (like tourism) then it is critical to develop laws and regulations that provide for some transfer of a property interest to a foreign entity. That transfer must then be made secure for a specific and definite period of time during which the foreign entity can depend upon security of use and occupancy and a relatively quick and easy resolution of conflict in a forum with which the entity is comfortable. Otherwise, the entity will seek a more hospitable environment in which to invest.

Solutions

I propose that there are at least two viable solutions to the dilemma faced by emerging Pacific island states: on the one hand, to protect indigenous rights in land, but, on the other, to attract foreign investment that is dependent upon some security of land rights or tenure. There is also a third alternative which is probably less desirable from the perspective of the foreign investor unless coupled with one or the other of the proposed first alternatives. In the first category, some form of title registration system or land court (torrens) coupled with leaseholds will serve the interests of both native governments and foreign investor. A second alternative is the trust modelled after the Mexican *fidecomiso* and/or the CNMI simple land trust upheld recently by the supreme court of the Commonwealth of the Northern Mariana Islands. The third is the Native Trust which acts for all native Fijians in connections with native lands.

Title registration system

A Pacific island state could establish a special land court or tribunal to establish conclusively all interests in land in the state, both public and private. The court or tribunal would be 'in session' for a fixed, but ample, period of time (say, 2–4 years) during which all claims of interest are recorded and reconciled. Hearings would take place during that period, which would be well-publicised. The established interests would then be recorded on a certificate pertaining to a particular parcel of land, and that certificate recorded in an appropriate central register. Beyond a certain date, no other interests would be recognised. A potential investor, foreign or otherwise, would then have a certain way of knowing with whom to negotiate for rights — presumably leasehold — in whatever parcel of real property looked suitable for investment purposes.

This system is similar to that established in Honolulu in 1903. Such a land court was established in that year for the purpose of administering a land registration or torrens system. A torrens system: '... a legal system for the registration of land, used to verify the ownership of land and establish the status of the title, including ownership and encumbrances, without the necessity of an additional search of the public records. The purpose ... is to establish an indefeasible title free from all rights or claims not registered with the registrar of title to the end that anyone may deal with such property with the assurance that only rights or claims of which he need take notice are those so registered.' [Reilly, *The Language of Real Estate in Hawaii* (1975) at 340].

Land registered under the above system cannot be acquired under the doctrine of adverse possession in most jurisdictions which use it, and deeds and other evidences of possession and ownership are not effective until recorded on the torrens 'certificate'. The system is in limited use on the US mainland (particularly in the State of Illinois), as well as in New Zealand and Australia. It is probably the most effective way to collect and record diverse interests in property for the purpose of dealing with nonresident investors.

Trusts

Under traditional trust law, a legal entity such as a trust, or the trustee acting for the trust, holds legal title to property, which means that within whatever limits are contained in the documents creating the trust, the trustee can act for the 'true' or beneficial (equitable) owners in connection with the property to which the trust applies. This means that the trust or trustee can lease the property, or part of it, if so empowered by the documents, but could not transfer any other rights to the property unless the trust documents so provided. It avoids the problems which have occasionally arisen in some Pacific island states in which a lessee of property has found itself in some difficulty when, due to traditional forms of holding rights in property, all the many lessors are not dealt with in the original lease, resulting in great uncertainty, the last thing that a foreign investor finds attractive.

The system has provided a means for foreign investment in Mexico within the coastal zone, in which foreigners are otherwise forbidden to own land under the Mexican Constitution, as noted in Part I, supra. 'Direct' ownership is distinguished from 'useful' or 'beneficial' ownership, and under a law which has its genesis in 1973, foreigners may hold beneficial or useful interests in coastal land as trust beneficiaries for as long as 30 years. Legal title is held by a financial institution and trust interests are marketable by means of trust participation certificates, after the trust itself is approved by the federal government [Vilaplana, 'The Forbidden Zones in Mexico', 10 *Cal West L Rev* 47 (1973) at 59–69, Callies, 'Government as Developer and Owner', 1 *Urban Law and Policy* 307 (1978) at 315–316. Lefcoe, op cit at 36].

Native trusts

One of the best examples of the use of native land trusts is that from Fiji. The Greater Suva Urban Structure Plan recognises the difficulties in attracting foreign investment due to native landholdings: 'The system of land tenure add immeasurably to the difficulties of achieving logical growth. At present, it is the Freehold and Crown Lands which are most likely to become available for development, irrespective of their suitability for this purpose.'

Under the Native Lands Act, all land which is not Crown land (between 80 per cent and 90 per cent of the land in Fiji) is native Fijian, held according to native custom and tradition. A Native Lands Commission is charged with surveying and registering such lands. It

remains native Fijian unless virtually an entire village dies out, at which point it reverts to the government of Fiji. All use of native land by non-Fijians is governed by the Native Land Trust, the Board of which acts as administrator and controller. In particular, the Board has the power to lease the land or grant licenses on it, so long as the land is not a native reserve or being 'beneficially' used or occupied by native Fijians. Aside from being thus an agent of Fijian 'owners' during negotiations and life of the lease, the Board also sees to necessary governmental approvals for various uses. It has the power to overrule native 'owners' and generally does not permit rescission. In 1983 there were over 23,000 active leases on native Fijian land [Nayailaloa, 'Fiji: Manipulating the System' in Crocombe (ed), *Land Tenure in the Pacific* (1971) at 206–220].

Conclusion

Security of tenure is essential for foreign investment in any country. Given potential investors' lack of familiarity with, and the complexity of, most Pacific island land tenurial relationships, it is essential that some simple and comprehensible means be established to permit development over a definite period of time with the guarantee that the rights in land necessary to do so will remain in place. The three alternatives set out in Part IV exemplify means to accomplish such security without giving up the primary rights of natives to their lands. A land registration system, either by itself or in combination with a native trust, represents probably the most effective and equitable way to establish such security.

SEMINAR REPORT

Foreign Investment in Vietnam

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The first International Bar Association (IBA) seminar exclusively on foreign investment in Vietnam was held in Paris on 9–10 September 1993 at the Lutetia Hotel. The event, which was organised by Committee V (Multinationals and Foreign Investment Policy) of the Section on Business Law, was attended by a select group of international legal experts and business persons interested in the prospects of investing in what many have predicted will be the next Asian tiger.

The seminar commenced with a cocktail reception on the evening of 8 September at which Robert Pritchard (Sydney), current Chairman of Committee V, gave a welcome address. The speakers and delegates were joined at the reception by the President of the Paris Bar, Georges Flécheux.

Klaus Böhlhoff, Chairman of the IBA Asia-Pacific Forum and past Chairman of the IBA Section on Business Law opened the first morning's session with a brief statement on the role this seminar played within the framework of the Asia-Pacific Forum's activities. Seminar Chairman André Moquet (Paris) then provided a general overview of two principal concerns of a sophisticated investor, the sanctity of his investment and the stability of the legal and economic environment in which such investment will generate its payback.

Jean-Jacques Lecat (Paris) followed with a broad description of the present legal, economic and political situation in Vietnam, explaining recent reforms and the overall progress being made as a result of such reforms. A more specific description of the particular foreign investment laws in force, including an explanation of the various investment vehicles and the requisite studies and documentation that need be produced in order to obtain an investment licence from the State Committee for Cooperation and Investment (SCCI), was given by Sesto Vecchi (New York).

William Magennis (Hanoi) spoke on how to prepare an investment in Vietnam and conduct negotiations with the Vietnamese authorities. Specific mention was made of the four types of Vietnamese business enterprises authorised to contract with foreigners as well as how the foreign investor can ensure that he has chosen the appropriate Vietnamese partner and is dealing with the Ministry in charge of the type of investment in question.

The current possibilities for obtaining financing to fund investments in Vietnam as well as a general description of the Vietnamese banking system and the role of foreign banks was the subject of Nguyen Ngoc Chau's (Paris) talk. Included in such discussion was a list of the type of projects favoured by banks as well as Mr Chau's view on the impact of the recent lifting of the IMF embargo.

Fraser White (Singapore) opened the afternoon session by covering the important topic of taxation. Mr White gave a summary of those taxes of most concern to a foreign investor and described available tax advantages such as tax holidays and preferential rates. The Vietnamese accounting system was mentioned with emphasis on the fact that foreign investors are free to opt for the applicability of international accounting standards and practices.

One of the highlights of the seminar was the speeches given by two high-ranking Vietnamese officials: Professor Luu Van Dat, legal counsel to the SCCI and major participant in the drafting of many of Vietnam's foreign investment laws, and Mr Duong Van Quang, First Political Counselor to the Vietnamese Ambassador to France. Professor Van Dat spoke on the increase in foreign investment in Vietnam over the last five years and gave an overview of the important measures adopted by the National Assembly aimed at protecting foreign investors' investments. Also covered by Professor Van Dat was the